economics of manufacturing 24 GHz equipment for the Washington, D.C. and Denver areas were supported, the Commission still would be obligated to weigh its policy of ensuring nationwide DEMS service against the effects its proposed relocation of DEMS licensees would have on other parties, potential 24 GHz services, and other vitally important public policies. The Commission, for example, has "entirely failed to consider" relevant factors regarding the impact its DEMS relocation will have on entities, such as DIRECTV, that intend to operate in the 24 GHz band to which DEMS has now been relocated -- a hallmark of arbitrary and capricious agency action.[54] And there are a variety of important public interest reasons why the allocation of part of the 24 GHz band for BSS expansion capacity serves the public interest, not the least of which is providing capacity for DBS providers to become more effective competitors to entrenched cable monopolies. The Commission's decisions in the DEMS Order should not have been made without "any consideration whatsoever" of such factors or competing policies.[55]

2. **The Allocation of the 24 GHz Band for DEMS Also Has No Nexus to a Military Function**

Even assuming *arguendo* that the Commission's decision to relocate all DEMS licensees from the 18 GHz band could be construed to have a valid nexus to a "military function," the Commission's decision to relocate DEMS to the 24 GHz band cannot. Again, once the Commission decided to remove DEMS from the 18 GHz band, the Government's national security concerns were addressed. The Commission could have taken that action, and then initiated a rulemaking proceeding to determine the best new "home" for DEMS. But the

---

54 *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42-43 (1983).

55 *Id.* at 51.

Commission instead attempted to use the basis of its decision to relocate DEMS *from the 18 GHz band* as a justification for its decision to relocate DEMS *to the 24 GHz band.* This attempted "bootstrapping" simply does not support the Commission's bypass of APA requirements.

The Commission states that its relocation of DEMS to 24 GHz "will facilitate, advance, support and accommodate the national defense."[56] Yet, the Commission's implication that actions that merely assist in the performance of military functions fall within the exception is fundamentally incorrect. The courts have clearly held that "military function" is determined by reference to the "specific function being regulated."[57] The exception is to be "narrowly construed," and invoked "only where the activities being regulated *directly involve* a military function."[58]

In this case, the "specific functions being regulated" by the Commission are the re-allocation of spectrum to DEMS, a commercial, non-military service owned and operated by private interests. The Government has absolutely no national security interest in the frequency band to which *any* DEMS licensee is relocated, or in whether *non-interfering* DEMS licensees are relocated from 18 GHz at all, so long as the Government's "military function" is not impaired. Once the Government was assured of its use of the 18 GHz band without interference at the locations in question -- Washington, D.C. and Denver -- its interest was satisfied, and "military function" vanished as a justification for further regulatory avoidance of proper administrative procedures.

---

56 DEMS Order at ¶ 1.

57 *Independent Guard Ass'n*, 57 F.3d at 769.

58 *Id.* (emphasis added).

3. Resolving NGSO/FSS Satellite Interference Issues Is Not A "Military Function"

The Commission's reliance on the military function exception is further undercut by the involvement of a private, commercial satellite service applicant with its own interest in seeing DEMS moved out of 18 GHz. The DEMS Order suggests that the complete relocation of DEMS licensees, rather than an accommodation only of the Government's interference concerns, was driven at least in part by alleged problems that Teledesic's satellite system would have in co-existing with DEMS licensees under the status quo. It is not mere coincidence that Teledesic's satellite license and the DEMS Order were issued on the same day. Indeed, it is Teledesic that is paying for the relocation of DEMS providers to the 24 GHz band.[59]

While DIRECTV understands the Commission's desire to seek a mutually beneficial solution for all of the different services, military and non-military, operating in the 18 GHz band, the Commission cannot craft a solution that tramples on the rights of other affected parties cloaked in the rationale of "military function." Unfortunately, the Commission's use of the exception to achieve a result that is broader than necessary, and that clearly favors the commercial interests of a single company at the expense of other providers, is "a perversion of the Commission's administrative processes for an improper purpose" that should be revisited by the Commission.[60]

---

59 DEMS Order at ¶ 10. The full terms of the reimbursement arrangement were not made public.

60 *Federal Broadcasting System, Inc. v. FCC*, 225 F.2d 560, 567 (D.C. Cir.), *cert. denied sub nom., WHEC v. Federal Broadcasting System*, 350 U.S. 923 (1955).

C. The Commission's Use Of The Good Cause Exception Also Was Improper

The Commission also attempts to justify its failure to conduct a notice and comment rulemaking regarding the decision to allocate the 24 GHz band to DEMS by invoking the "good cause" exception to the notice and comment requirement of the APA.[61] However, as with the "military function," the Commission stretches "good cause" well beyond the narrow contours of the exception.

1. The Commission Has Failed to Articulate "Good Cause" to Dispense With APA Requirements

In response to the Commission's assertion that notice and comment rulemaking was "unnecessary" in relocating DEMS,[62] it is important to state the obvious: the allocation of spectrum for a particular service is a major amendment to the Commission's rules that is normally accomplished through notice and comment rulemaking. In contrast, a rulemaking is "unnecessary" when it involves a "minor rule or amendment in which the public is not particularly interested."[63] The Commission's suggestion that notice and comment on its decision to allocate the 24 GHz band to DEMS is "unnecessary"[64] does not square with the judicially recognized and widely accepted meaning of that term under the APA.[65]

---

61 DEMS Order at ¶ 18; *see* 5 U.S.C. § 553(b)(3)(B).

62 DEMS Order at ¶ 18.

63 Tom C. Clark, Attorney General, United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 31 (1947), *reprinted in* Office of the Chairman, Administrative Conference of the United States, Federal Administrative Procedure Sourcebook: Statutes and Related Materials (1985).

64 DEMS Order at ¶ 18.

65 The Commission has, in the past, properly invoked the good cause exception for minor "ministerial correction[s]" that did not involve "a substantive change to the rules." *See Government Satellite Authorization Order,* 10 FCC Rcd at ¶ 5 n. 5 (adding footnote to spectrum allocation table to correct an inadvertent omission).

Neither has the agency explained why notice and comment procedures are "contrary to the public interest."[66] The law is clear that "[a] mere recitation that good cause exists, coupled with a desire to provide immediate guidance, does not amount to good cause."[67] Even if the situation presented here were the type of situation in which the good cause exception applied (and it clearly is not), the DEMS Order is defective in its failure to provide reasons that support a finding of good cause.

2. **No Exigent Circumstances Are Present To Warrant a "Good Cause" Finding**

This case simply does not present the exigencies that ordinarily support an agency finding of "good cause" to waive notice and comment procedures. The good cause exception was intended primarily to provide agencies with the ability to respond to emergency situations.[68] It was not meant to be an "escape clause" by which agencies can avoid their notice and comment responsibilities.[69] For this reason, the good cause exception, like the "military function" exception, is "narrowly construed and only reluctantly countenanced."[70] And nothing in the Commission's DEMS Order suggests that the Commission faced an emergency situation that required it to take any action to protect Government or commercial interests at 18 GHz, or to allocate the 24 GHz band for DEMS use, without notice and comment rulemaking.

---

66 DEMS Order at ¶ 18.

67 *Zhang v. Slattery*, 55 F.3d at 746 (2d Cir. 1995), *cert. denied*, 116 S.Ct 1271 (1996).

68 *Action on Smoking and Health v. Civil Aeronautics Board*, 713 F.2d at, 800; *see Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992).

69 *Zhang*, 55 F.3d at 746; *Tennessee Gas Pipeline Co.*, 969 F.2d at 1144.

70 *Tennessee Gas Pipeline Co.*, 969 F.2d at 1144; *Action on Smoking and Health*, 713 F.2d at 800.

The Government has been authorized to use the 18 GHz band since July 1995 and was on notice of the DEMS licenses the Commission had been issuing in the band prior to that date.[71] From that time to the present, the Commission has been using "interim procedures" to prevent non-Government users of the 18 GHz spectrum from interfering with the Government's satellite operations.[72] Under the terms of the DEMS Order, only DEMS operations in the Washington, D.C. and Denver areas confront an imminent move to 24 GHz. Yet, even in that circumstance, the Commission cites nothing to suggest that interim measures could not or would not protect Government interests while the Commission determines the most appropriate course of action.

Nor will the minor delay caused by a notice and comment proceeding harm commercial interests. While DEMS may finally become a marketplace reality in the next few years, DEMS is hardly a thriving service depended on or used by substantial numbers of people.[73] Indeed, the Commission has permitted DEMS licensees to operate in the 18 GHz band until January 1, 2001 -- nearly four years from the date of the DEMS Order. The Commission's own timetable for transitioning DEMS licensees to new frequencies thus illustrates that there is no urgency present that might justify the serious deprivation of due process the Commission has effected here.

Finally, Teledesic's NGSO/FSS system is still years from operation. Although it may have a legitimate commercial need to resolve potential interference issues at 18 GHz,

---

71 DEMS Order at ¶¶ 13, 22.

72 *Id.* at ¶ 3.

73 Teledesic Order at ¶ 22 (Teledesic characterization of DEMS as a "defunct service").

Teledesic is entitled to no greater procedural rights in requesting relief than other parties, such as DIRECTV, who will be affected by the "daisy chain" effects that Commission adjustments at 18 GHz will have. Given DIRECTV's own interest in rapidly constructing and launching its expansion BSS system using the 24 GHz band, DIRECTV certainly would support expedited resolution of a rulemaking proceeding in which NGSO/FSS interference concerns with DEMS at 18 GHz are addressed, as well as DIRECTV's own petition to allocate the 24 GHz band for BSS uplinks. No commercial party, however, should receive special insulation from the proper functioning of the administrative process.[74]

V. CONCLUSION

The Commission's decision to waive the requisite notice and comment procedures in promulgating the rule and policy changes in the DEMS Order cannot be upheld. DIRECTV therefore respectfully requests that the Commission reconsider the actions taken in the DEMS Order, initiate a rulemaking proceeding, and modify all DEMS licenses appropriately in accordance with the results of that proceeding. The rulemaking proceeding should consider and answer questions that include the following:

(1) Can Teledesic's commercial NGSO/FSS satellite operations, the Government and DEMS licensees in fact be accommodated at 18 GHz, with no need for DEMS to be relocated to other bands?

(2) If certain DEMS licensees serving the Washington, D.C., and Denver, Colorado areas must be relocated due to interference with Government satellite operations, to what band should these licensees be relocated?

(3) What, if any, are the costs and benefits of relocating all DEMS licensees from the 18 GHz band (as the Commission has done) and the policy reasons for taking such action? To the extent that concerns center on coordination with NGSO/FSS satellite operations, what

---

74 *See Independent Guard Ass'n*, 57 F.3d at 770 (costs to agency of conducting notice and comment rulemaking are "minimal in nature").

measures can be taken to facilitate the co-existence of NGSO/FSS systems and DEMS licensees without relocating DEMS licensees?

(4) If it is determined that the wholesale relocation of DEMS is necessary or desirable from a spectrum management or other public policy perspective, to what bands should DEMS be relocated?

(5) To the extent that 24 GHz is selected as candidate spectrum for DEMS use, what other uses are proposed for those bands, what effect would DEMS operations have on those proposed uses, and how can the interests of all parties be accommodated in the 24 GHz band? Given that the Commission already has proposed to significantly increase the amount of spectrum DEMS licensees may use at 24 GHz relative to their current allocation at 18 GHz, what would be the comparative benefits and burdens of providing DEMS operations access to only the amount of spectrum they currently enjoy, when counterbalanced against other services proposed for the 24 GHz band?

These are the types of questions that could and should have been answered prior to adoption of the DEMS Order, had there been an opportunity presented for notice and comment. DIRECTV urges that they now be addressed.[75] In addition, while this proceeding remains pending, and the DEMS Order remains non-final, DEMS licensees are on clear notice that any actions taken to transition their operations to 24 GHz are taken *at their own risk*, and are subject to the ultimate outcome of this and any related proceedings.[76]

---

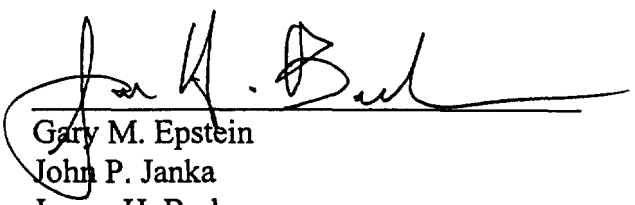
[75] DIRECTV also notes that, without any discussion in the text of the DEMS Order, and also without notice and comment, the Commission has modified the Table of Frequency Allocations contained in Section 2.106 of its rules by adding a primary allocation to the non-Government radionavigation service at 21.75 - 25.25 GHz. It is unclear whether this is a typographical error or whether there is some service contemplated that could have a preclusive effect on the use of this band by the fixed-satellite service for BSS feeder links. If the latter is the case, then this action too should be reconsidered and addressed in the requested rulemaking proceeding.

[76] For example, the Commission has put Teledesic on notice that its license is subject to any rules that may be adopted with respect to DEMS at 18 GHz. Teledesic Order at ¶ 38.

June 5, 1997

Respectfully submitted,

DIRECTV Enterprises, Inc.



Gary M. Epstein
John P. Janka
James H. Barker
Nandan M. Joshi
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 637-2200
Its Attorneys

DECLARATION OF PAUL R. ANDERSON

I, Paul R. Anderson, hereby declare as follows:

1. I am Director, Communications Systems for DIRECTV Enterprises, Inc. ("DIRECTV"). I am an engineer by training and familiar with the technical and interference characteristics of DIRECTV's DBS System, the requirements of Part 25 and Part 100 of the commission's rules, and the interference and technical issues referenced in the foregoing Petition for Reconsideration.

2. I have reviewed the foregoing Petition for Reconsideration from a technical perspective, and the information contained therein is true and accurate to the best of my knowledge, information and belief.

By: 

Paul R. Anderson
Director, Communications Systems
DIRECTV Enterprises, Inc.

June 4, 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service	)))))	ET 97-99

CONSOLIDATED REPLY OF DIRECTV ENTERPRISES, INC.

DIRECTV Enterprises, Inc.

Gary M. Epstein
John P. Janka
James H. Barker
Nandan M. Joshi
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 637-2200

Its Attorneys

July 23, 1997

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service	)))))	ET 97-99

CONSOLIDATED REPLY OF DIRECTV ENTERPRISES, INC.

DIRECTV Enterprises, Inc. ("DIRECTV"), hereby replies to the Joint Opposition to Petitions for Reconsideration, Partial Reconsideration, and Clarification ("DEMS Opposition") filed by Digital Services Corporation, Teligent, L.L.C. and Microwave Services, Inc. (collectively, the "DEMS Licensees"), and the Consolidated Opposition of Teledesic Corporation to Petitions for Reconsideration ("Teledesic Opposition"), each filed on July 8, 1997, in the above-captioned proceeding.

On reconsideration, DIRECTV and others have shown that the Commission plainly overstepped its bounds in dispensing with notice and comment procedures in order to adopt the DEMS Order on the basis of the "military function" exception to the APA. Apart from actions taken to address specific Government interference concerns in Washington, D.C. and Denver, Colorado, the rest of the actions taken by the Commission were grounded in commercial policy goals -- the twin desires to ensure nationwide DEMS service and non-interference with Teledesic's proposed NGSO satellite system -- of the type that may be addressed by the Commission *only* through the notice and comment rulemaking process mandated by the APA.

No persuasive reason has been presented by the Commission, the DEMS Licensees or Teledesic as to why the mandatory APA procedures were not followed here.

Congress and the courts have emphasized that the "military function" exception to the APA is narrow in scope,[1] and must be "narrowly construed and reluctantly countenanced."[2] While the approach of the DEMS Licensees and Teledesic to this fundamental rule of law is to ignore it, the Commission simply may not. The Commission must reconsider its actions taken in the DEMS Order, hold a rulemaking to resolve the many issues raised by the wholesale relocation of DEMS licensees from 18 GHz, taking into account the interests of all affected parties, and modify all DEMS licenses appropriately based upon the results of that proceeding. Any other result would be arbitrary and capricious, and would violate DIRECTV's due process rights.

I. THE COMMISSION'S ACTIONS IN RELOCATING DEMS LICENSEES FROM 18 GHz TO 24 GHz ON A NATIONWIDE BASIS CANNOT BE JUSTIFIED FACTUALLY OR LEGALLY AS AN EXERCISE OF A "MILITARY FUNCTION"

The DEMS Licensees and Teledesic claim that all of the actions taken by the Commission in the DEMS Order -- that is, (1) relocating DEMS licensees in the Washington, D.C. and Denver Colorado areas from the 18 GHz band; (2) relocating all other DEMS licensees in the rest of the country from the 18 GHz band; (3) choosing and reallocating the entire 24 GHz band for DEMS use; and (4) quadrupling the spectrum used by DEMS licensees at 24 GHz -- were justified by national security concerns expressed in two letters sent to the FCC by the NTIA. Teledesic, for example, proclaims that the "Executive Branch asked the FCC to do

---

1 *Independent Guard Ass'n v. O'Leary,* 57 F.3d 766, 769 (9th Cir. 1995).

2 *Id.* (quoting *Alcaraz v. Block,* 746 F.2d 593, 612 (9th Cir. 1984)).

exactly what it did, exactly the way it did it, for national security reasons."[3] And according to the DEMS Licensees, "[n]o one . . . is qualified to second-guess NTIA's (or the Defense Department's) determination" with respect to these sensitive matters, regardless of the agency actions that the determination purports to justify.[4] Such arguments are factually incorrect and directly contrary to the case law construing the APA's "military function" exception.

A. The National Security Concern Expressed in the NTIA Letters Is Very Narrow In Scope

To begin, the DEMS Licensees and Teledesic have blatantly mischaracterized the magnitude of the national security issue raised in the NTIA letters. Reading the DEMS Licensees and Teledesic Oppositions, one would believe that NTIA had expressed comprehensive national security concerns about the continued existence of nationwide DEMS operations at 18 GHz.[5] In fact, this is not the case.

On January 7, 1997, the NTIA submitted to the FCC a request, encapsulated in the very first paragraph of that letter, that the Commission "protect *two* government earth stations."[6] The NTIA explained that these earth stations, located "in the Denver CO and Washington, D.C. areas," were associated with Government "space stations in the fixed-satellite service that operate

---

3 Teledesic Opposition at 2.

4 DEMS Opposition at 2; *see* Teledesic Opposition at 8 (Commission should not second-guess "NTIA invocations of national security").

5 *See, e.g.,* Teledesic Opposition at 5-6 (NTIA request, "in the name of national security," encompassed "all the major details of" the DEMS order).

6 Letter from Richard Parlow, Associate Administrator, Office of Spectrum Management, NTIA, to Richard Smith, Chief, Office of Engineering and Technology, FCC, dated January 7, 1997, at 1 ("First NTIA Letter") (emphasis added).

at 17.8 - 20.2 GHz that need to be protected."[7] The NTIA further explained that it had determined that licenses had been granted to DEMS networks that "include both the Denver and Washington areas," and that "co-frequency, co-coverage use of the 17.8-20.2 GHz band by earth stations of the Government fixed-satellite service and the non-Government DEMS will not be possible within 40 km of our earth stations" in those areas.[8]

The follow up letter submitted by the NTIA to the FCC on March 5,1997,[9] also addressing the interference issue, again highlights the very limited nature of the NTIA's national security concern. The NTIA did *not* request that the FCC terminate all DEMS licenses at 18.82-18.92 GHz and 19.16-19.26 GHz, nor did it request "replacement licenses" for all DEMS licensees at 24 GHz; instead, it requested termination and replacement licenses *only* for DEMS operations "*anywhere within the exclusion zones defined in Attachments A*" -- *i.e.,* zones with center coordinates in Washington, D.C. and Denver.[10] Neither did the NTIA request the FCC to exclude all future licensees from using the 18 GHz band; instead, it requested exclusion *only* of future licensees proposing to operate "*anywhere within the exclusion zones defined in Attachment A.*"[11]

---

7 *Id.*

8 *Id.* at 2.

9 Letter from Richard Parlow, Associate Administrator, Office of Spectrum Management, NTIA, to Richard Smith, Chief, Office of Engineering and Technology, FCC, dated March 5, 1997 ("Second NTIA Letter").

10 *Id.* at 1, ii) & Attachment A (emphasis added).

11 *Id.* at 1, iv) & Attachment A (emphasis added). In light of the careful limitation of the DEMS relocation request in the NTIA proposal (the Washington, D.C. and Denver exclusion and coordination zones specified in the letter's Attachment A) the suggestion by Teledesic that the Second NTIA Letter "nowhere suggests that NTIA's national

Viewed against a plain reading of the NTIA letters, the suggestion of Teledesic and the DEMS Licensees that the letters contain a "national security" mandate for the Commission to take all of the actions in the DEMS Order is insupportable.[12] To be sure, after having articulated the interference issue involving the Government earth stations in Denver and Washington, D.C., NTIA also attempted to anticipate some of the *commercial* policy concerns with which *the FCC* was likely to grapple. For example, NTIA specifically noted its "understanding" of *the FCC's* desire to have frequencies made available for DEMS use on a nationwide basis,[13] and offered to make spectrum available at 24.25-24.65 GHz for DEMS use -- obviously more spectrum than necessary to address the national security problem identified -- in order to accommodate *Commission* policy goals that might be broader than NTIA's own interference problems. But the mere fact that the NTIA has released government access to spectrum that could facilitate a permanent, nationwide DEMS relocation does not create a nexus to a "military function" that can justify waiving APA notice and comment procedures for the wholesale relocation of DEMS operations outside of Washington, D.C. and Denver.

Nor do commercial spectrum policies become linked to "military functions," as Teledesic and the DEMS Licensees assert, merely by virtue of being voiced by NTIA. Teledesic, for example, argues:

---

security concerns related only to the relocation of DEMS in Washington, D.C., and Denver," Teledesic Opposition at 8, is clearly incorrect.

12 The NTIA Letters are unambiguous in their focus on an important, but narrow, interference concern in Denver and Washington. There is no room creatively to "interpret" them broadly, as the DEMS Licensees and Teledesic attempt to do, given the fact that the military function exception is to be "narrowly construed and reluctantly countenanced." *Independent Guard Ass'n*, 57 F.3d at 769.

13 First NTIA Letter at 2.

> As the APA implicitly recognizes, agencies such as the Commission are not military agencies and are not competent to make military judgments. The petitioners appear to advocate an administrative regime under which the Commission second-guesses NTIA invocations of national security in order to ensure NTIA is not giving up more spectrum than necessary, but neither reason nor authority supports the suggestion that the Commission should play such a role.[14]

The fallacy of this argument is that it fundamentally begs the question as to what constitutes a judgment pertaining to "national security," and would instead have courts and agencies bow to invocations of "military function" by Executive Branch agencies no matter how broad. This is not the law, and for good reason. The "military function" exception to the APA simply was not intended to be an "escape clause" that an agency "'could utilize at its whim'" to bypass notice and comment procedures.[15]

According to the courts, and the legislative history of the APA, the determination of a "military function" plainly is an inquiry that does not hinge on the military or civilian nature of the agency in question.[16] The NTIA advises the Commission on many types of spectrum policy, licensing and service rule issues in hundreds of proceedings, including on behalf of the DoD, expressing both military and non-military concerns. It thus is illogical to argue that NTIA's Executive Branch status is or should be completely dispositive of the deference that

---

14 Teledesic Opposition at 9; *see* DEMS Opposition at 10 (asserting that Congress "intended agencies to defer to those charged with protecting national security when determining whether to invoke this provision").

15 *Independent Guard Ass'n*, 57 F.3d at 769 (quoting *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984)).

16 *Id.* at 769; *see* S. Rep. No. 752, 79th Cong., 1st Sess. 13 (1945) (noting that "since the bill relates to functions, rather than agencies, it would seem better to define functions").

should be accorded its recommendations.[17] Indeed, the FCC, like the DOE in *Independent Guard Ass'n*, has a statutory mandate that also includes both "civilian" and "military" functions.[18] Decisionmakers therefore are instructed to look "not to whether the overall nature of the agency promulgating a regulation is 'civilian' or 'military,' but to the *function being regulated*" in determining whether APA requirements have been properly waived on the basis of this narrow exception.[19]

In this regard, it is plain that the DEMS Order effected a mix of regulatory changes, the majority of which do not relate in any way to a "military function." The Commission expressly found that NTIA's interference concerns could be addressed in their entirety by relocating "the Washington, D.C. and Denver, Colorado [DEMS] operations only."[20] *That finding ends the "military function" inquiry.* The Commission easily could have relocated DEMS operations in those two areas, and then held an expedited notice and comment proceeding to address the issues surrounding a wholesale DEMS relocation, including its concern about promoting nationwide DEMS service, and the concerns of third parties (such as DIRECTV) that

---

17 Teledesic and the DEMS Licensees are correct that the Commission should not second-guess the NTIA's decision to release government spectrum for commercial use. That does not mean, however, that the Commission must follow NTIA's suggestions on how the spectrum should be licensed commercially.

18 *Independent Guard Ass'n*, 57 F.3d at 769; *see* 47 U.S.C. § 151 (a fundamental purpose of the FCC is to "make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense. . .").

19 *Independent Guard Ass'n*, 57 F.3d at 769 (emphasis added).

20 *DEMS Order* at ¶ 11.

might be affected by such a move. The Commission did not, however, and its failure to do so cannot legally be sustained.

B. *Bendix* Affirmatively Undercuts The Commission's Actions

In addition to misconstruing the NTIA letters, the DEMS Licensees and Teledesic also misinterpret applicable law. In particular, they argue that the Commission's actions are supported by *Bendix Aviation Corp. v. FCC*,[21] the lone case cited by the Commission in the DEMS Order as a basis for its decision to forego notice and comment. But a close examination of *Bendix* and the FCC proceedings at issue in that case reveals that the DEMS Licensees and Teledesic have completely misread the facts in *Bendix*. The case not only is entirely distinguishable from the present one, but actually *highlights* the deficiency of the Commission's actions here. In *Bendix,* the Commission afforded petitioners and affected third parties *precisely* the opportunity for notice and comment, and consideration of their interests, that DIRECTV and others have been denied.

Bendix involved a series of FCC proceedings that culminated in an order, adopted on April 16, 1958, without prior specific notice and comment,[22] which effected various changes in the Commission's Table of Frequency Allocations. In an action that the DEMS Licensees and

---

21 272 F.2d 533 (D.C. Cir. 1959).

22 Amendment to Parts 2, 4, 7, 8, 9, 10, 11, 12, 16 and 21 of the Commission's Rules and Regulations to reallocate certain frequency bands above 25 mc, now designated for exclusive Amateur or other non-Governmental use, to Government services on a shared or exclusive basis, and conversely to reallocate to non-Governmental use certain bands now designated for Governmental use, *Memorandum Opinion and Order,* 17 Rad. Reg. (P&F) 1505 (released April 18, 1958) ("April Order"), *reconsideration denied, Memorandum Opinion and Order*, 17 Rad. Reg. (P&F) 1587 (released July 31, 1958) ("July Order").

Teledesic claim is analogous to the instant case, the Commission invoked national security concerns to reallocate spectrum at 8500-9000 MHz, which had been a band shared between U.S. Government users and commercial licensees in the aeronautical radionavigation service, for exclusive use by the Government for military uses.[23] In the April Order, the Commission provided that commercial 8 GHz licensees could continue to operate at 8 GHz on a non-interference basis with Government licensees until moved to a frequency band to be allocated to the commercial aeronautical radionavigation service at a future date. That same day, the Commission commenced a rulemaking that *proposed* to reallocate the 13 GHz band for displaced 8 GHz aeronautical licensees.[24] On July 31, 1958, after providing notice and opportunity for comment, the Commission denied commercial licensee petitions for reconsideration of the April Order, and on the same day *allocated* the 13 GHz band for commercial use in order to transition licensees from 8 GHz to the higher frequencies.[25]

In denying a challenge to the April and July Orders by a displaced Doppler radar licensee -- the equivalent of the DEMS Licensees here -- the D.C. Circuit found that the agency had not acted arbitrarily and capriciously in re-allocating the 8 GHz band for exclusive Governmental use without notice and comment. The Court found that the Commission had

---

23 *Bendix*, 272 F.2d at 540-42.

24 *Id.* at 540-41; *see* 15 Rad. Reg. (P&F) at 1507; Frequency Allocations and Radio Treaty Matters; General Rules and Regulations, Docket No. 12404; *Notice of Proposed Rulemaking*, 23 Fed. Reg. 2698 (April 23, 1958), Errata, 23 Fed. Reg. 3022 (May 8, 1958).

25 *See* Part 2 - Frequency Allocations and Radio Treaty Matters; General Rules and Regulations, Docket No. 12404, *Report and Order*, 23 Fed. Reg. 6111 (August 9, 1958) (summarizing order released July 31, 1958).

properly deferred to "essential national defense requirements" to put "all potential users of the frequency in question . . . on immediate notice that at some future date the [8 GHz frequency band] was to be exclusively Government."[26] Moreover, the Court noted that in the proceedings that preceded the April Order, the displaced licensees had received notice and indeed, had affirmatively supported, the re-allocation of 13 GHz spectrum for non-Government aeronautical radionavigation use.[27]

The most important point to note about the facts and holding of *Bendix* is that the "military function" exception in that case was invoked narrowly by the Commission, and was used to justify *only* the re-allocation of the 8 GHz band for exclusive Government radiopositionng use. Contrary to the suggestion of the DEMS Licensees and Teledesic, the exception *was not* used to bootstrap the re-allocation of the 13 GHz band for commercial use in the manner that those parties suggest, nor was the reallocation of the 13 GHz band even challenged in *Bendix*.

To the contrary, as the *Bendix* court noted, there in fact had been a preliminary notice of hearing issued by the Commission as early as November 9, 1956, to address the requirements for the radionavigation service above 8 GHz, including the 13 GHz band.[28] In those proceedings, "[v]irtually every segment of the public . . . licensed to operate radio and

---

26 *Bendix*, 272 F.2d at 542.

27 *Id.* at 542-43.

28 *Id.*

television stations was represented,"[29] and testimony expressly included industry views on the reallocation of the 13 GHz band for non-Government use.[30] The Commission expressly took note of these prior proceedings in the April Order.[31] And as a result of those prior proceedings, the Commission in the July Order determined that parties "in a very real sense have *not* been deprived of an opportunity to be heard in this matter"[32]:

> As already pointed out, the Commission, in arriving at its decision to reallocate the affected frequencies, considered the written comments filed in its Docket 11997 proceeding and the comments and testimony in Docket No. 11866. *Representatives of virtually every segment of the industry with an interest in the frequencies under consideration participated in those proceedings. Their requirements and proposals with respect to these portions of the radio spectrum were fully set forth....* Thus the action of April 16, 1958, was not based solely on the representations of ODM as contended by several petitioners *but took into account the views which the industry had just previously placed before the Commission.*[33]

Thus, in *Bendix*, and unlike the present case, "virtually every" affected industry segment had received an opportunity to express its view on the 13 GHz reallocation issues *before* "military function" was invoked by the FCC to relocate 8 GHz commercial uses to 13 GHz.

In addition, in adopting the April Order indicating that 8 GHz users would be displaced in deference to exclusive Government uses, the Commission that same day adopted a

---

29 Allocation of Frequencies in Bands Above 850 Mc, *Report and Order*, 27 F.C.C. 359, 360, at ¶¶ 2-3 (adopted July 29, 1959).

30 *Bendix*, 272 F.2d at 542 (petitioners in FCC testimony culminating in April Order "had recognized the availability of a [13 GHz] frequency and had given it their support").

31 April Order, 17 Rad. Reg. (P&F) at 1507, ¶ 6.

32 July Order, 15 Rad. Reg. at 1592, ¶ 10 (emphasis in original).

33 *Id.* (emphasis added).

Notice of Proposed Rulemaking that sought to make "available to non-Governmental users as quickly as practicable those [Governmental] bands . . . to be designated as exclusive non-Governmental stations in partial compensation for the loss of the other non-exclusive bands."[34] This notice expressly noted the FCC's proposal to reallocate a large portion of the 13 GHz band for commercial use by licensees relocated from 8 GHz,[35] and ultimately resulted in the express allocation of the 13 GHz band for relocated licensee use three months later in an order released on the same day as the July Order.[36]

The bottom line is that both the relocated licensees and interested third parties in *Bendix* clearly were afforded not one but *two* opportunities to express their interests in and views regarding the reallocation of the 13 GHz band *prior* to any licensee being transitioned from 8 GHz to 13 GHz. That fundamental and dispositive fact stands in marked contrast to the situation here, where the Commission summarily changed the allocation at 24 GHz and reauthorized DEMS licensees there in a manner that may foreclose DIRECTV's proposed used of the 24 GHz band.

A proper application of *Bendix* by the Commission should have yielded a narrow invocation of the "military function" exception, and an opportunity for interested parties to comment on the destination of relocated DEMS licensees. Just as in *Bendix*, the Commission in

---

34 Frequency Allocations and Radio Treaty Matters; General Rules and Regulations, Docket No. 12404, *Notice of Proposed Rulemaking*, 23 Fed. Reg. 2698 (April 23, 1958), Errata, 23 Fed. Reg. 3022 (May 8, 1958).

35 *Id.* at 2699.

36 Allocation of Frequencies, Amendment to Part 2 of the Commission's Rules and Regulations, *First Report and Order*, Docket No. 12, 404 (released July 31, 1958).

this case could and should have issued an expedited rulemaking proceeding with respect to the 24 GHz or other bands after it had accommodated the Government's immediate national defense concerns at 18 GHz. Thus, the DEMS Order must be reconsidered, and appropriate proceedings initiated and resolved by the Commission, before any relocation of DEMS from 18 GHz can be finally effected.

II. THE COMMISSION HAS NOT TAKEN INTO ACCOUNT THE REQUIREMENTS OF INTERESTED PARTIES AT 24 GHz

It is clear from the facts of *Bendix* why there was no challenge by 13 GHz users to the Commission's decision to accommodate displaced GHz licensees at 13 GHz: the Commission had received comment from both 8 GHz licensees and 13 GHz interests *well before* it effected the relocation of 8 GHz licensees to 13 GHz. Aside from the fact that *Bendix* mandates a similar approach here, there are compelling public policy reasons for the Commission to conduct a notice and comment rulemaking prior to the relocation of DEMS to 24 GHz.

DIRECTV has filed with the Commission an application for an expansion BSS system that will make use of the 24 GHz band.[37] DIRECTV thus is entitled to be heard with respect to any action that will affect the operation of that expansion system, and to have the opportunity to study technical information concerning any proposed relocation of 18 GHz DEMS licensees to 24 GHz.

In this regard, it is clear that current publicly available information is deficient with respect to the operational parameters of 24 GHz DEMS systems. Although the DEMS

---

[37] Application of DIRECTV Enterprises, Inc. for Authority to Construct, Launch and Operate an Expansion System of Direct Broadcast Satellites (June 5, 1997).